CHE IBRAHIM CHE ISMAIL

v.

MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: 44-1-2001]
11 SEPTEMBER 2001

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Medical tests - Power of magistrate - Whether magistrate can detain and then release suspect - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 4(1)(b), 6(a)*

The detainee/applicant was produced before a magistrate on 24 April 2000 who, pursuant to s. 4(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'), ordered him to be remanded for seven days to undergo medical tests to ascertain if he was a drug dependant. At the end of the remand period, the detainee/applicant who had yet to undergo the requisite medical tests was again brought before the same magistrate who ordered him to be released on bail with surety. The said medical tests were finally carried out on 20 August 2000 and tendered to the magistrate on 24 March 2001. Relying upon the test reports and pursuant to s. 6(2) of the Act, the magistrate ordered the detainee/applicant to undergo treatment and rehabilitation for a period of two years and subsequently police supervision for another two years. This was the applicant's application for a writ of *habeas corpus* on the grounds that: (i) he should have been subjected to a medical examination during his remand period, which would have determined whether he was a drug dependant; (ii) the magistrate should have ensured that the requisite medical examination was conducted during the remand period, and that his release order in spite of the non compliance of the first order was a clear contravention of the intention of the relevant provision of the Act; and (iii) the magistrate had erred in allowing the medical report based on tests conducted way out of time to be alluded to as proof to confirm that he was a drug dependant.

Held:

[1] Pursuant to s. 4(1)(b) of the Act, the magistrate had two options open to him, *ie*: (i) if it appeared necessary to him, order the detainee to be remanded for a period not exceeding fourteen days for the purpose of undergoing medical examinations; or (ii) release the detainee on bail with or without surety with specific instructions written on the bond on the time and place to undergo the requisite medical tests. (p 512 e)

[2] It was plain and obvious that in s. 4(1)(b) of the Act the drafters of the statute had resorted to the word 'or' instead of 'and' to underline Parliament's intention that it should be read as having a disjunctive rather than conjunctive effect. Therefore, having ordered the detention of the applicant for the purpose of undergoing medical examinations, the magistrate was barred from issuing any fresh order for the release of the applicant on bail for the same purpose of undergoing medical tests. (p 513 d)

[Writ of habeas corpus granted.]

Case(s) referred to:
Green v. Premier Glynrhonwyy Slate Co [1928] 1 KB 568 ***(refd)***

Legislation referred to:
Drug Dependant (Treatment and Rehabilitation) Act 1983, ss. 4(1)(b), 6(a)
Federal Constitution, art. 5(3)

Other source(s) referred to:
P St J Langan, *Maxwell on The Interpretation of Statutes*, 12th edn, p 232
Salleh Buang, *Statutory Interpretation*, p 17

For the applicant - Wan Jawahir Hj Harun; M/s Wan Jawahir & Co
For the respondents - Abdul Rani Megat Kassim

Reported by K Ganesh

JUDGMENT

Suriyadi Halim Omar J:
The detainee was arrested on 4 April 2000 suspected of being a drug dependant, subsequently to be produced before a magistrate on 24 April 2000. The magistrate, invoking the power vested by s. 4(1)(b) of the Drug Dependent (Treatment and Rehabilitation) Act 1983 (hereinafter referred to as 'the Act'), had remanded him for seven days from 24 April 2000 to 30 April 2000 for purposes of undergoing medical test to ascertain whether he was a drug dependent or otherwise (interchangeably referred to as the 'medical test').

At the end of the detention period the detainee was once again brought before the magistrate, without the former having complied with the judicially required test. For some unfathomable reason, instead of ordering the detainee to proceed with the tests promptly, subject to the remand order being extended, had instead released him on bail with surety. Mention after mention dates followed, with the detainee eventually undergoing the medical examination on 20 August 2000, nearly four months after the arrest. The medical report, which was in form 2, and certified by a government medical officer, was finally readied and tendered to the magistrate on 24 March 2001, nearly a year later.

Acquiescing to the application of the police, and relying on the impugned medical report, the learned magistrate had made an order pursuant to s. 6(a) of the Act. Pursuant to that order the detainee was ordered to undergo treatment and rehabilitation at a rehabilitation centre for a period of two years, at the end of which he was to undergo police supervision for two years.

The detainee, through his counsel had filed for a writ of *habeas corpus* on the grounds that:

a. the detainee was not taken to a medical officer for examination during the seven days period pursuant to the remand order, and have tests run on him. The medical report would evince whether he was a drug dependant or not;

b. having opted to make a remand order, the learned magistrate should have ensured that he went through the required test during that specific period. By making another order to have the detainee released on bail, when the requirement of the first order was yet to be carried out, clearly had contravened the intention of the relevant provision; and

c. the medical report, based on an examination conducted way out of time, contravened the Act, and thus was flawed. That document should not have been alluded to as proof to confirm that the detainee was a drug dependant.

Apart from the above reasons, the following flaws were detected by me and open to consideration, namely:

1. The arrest was carried out on 4 April 2000. Pursuant to art. 5(3) of the Federal Constitution, a person arrested shall be informed as soon as may be of the grounds of his arrest. In this case the detainee was only medically tested on 20 August 2000. There was some doubt as to whether that test was in relation to a totally new set of facts or based on the original arrest. Surely by the time the hospital had checked on the detainee in August, any drugs consumed on 24 April 2000 would have dissipated. Not only was no explanation supplied pertaining to this doubt but also the cause of the delay. That being so, bearing in mind the harsh and draconian repercussion on the detainee, for any non-compliance of the law, the court must construe that shortcoming in a manner most favourable to the detainee.

2. The law required certification to be carried out by a government medical officer or a registered medical practitioner. In fact the court's order also recorded that requirement. The confirmation test of whether the urine of the detainee contained drugs, came from one Nik Muhammad bin Mahmood, from the Department of Pathology of the Kota Bharu hospital, Kelantan. This confirmation was only made on 25 April 2000. Despite that, the certification was made only four months later, not by the abovementioned Nik Muhammad binti Mahmood but by one Dr. Nor

Shamsi bt. Abd Manaf, who did not conduct the urine test on the detainee. There was no affidavit filed either by the said pathologist. Certainly the finding of Dr. Nor Shamsi must be hearsay based, making her medical certificate in this case open to question. The legal effect therefore must also be similar to the above supplementary reason.

Notwithstanding the sufficiency of the two supplementary reasons, I now divert my attention and energy on the reasons ventilated by the detainee. I start of by laying down s. 4(1)(b) of the Act, which reads:

> the person may be produced by an officer before a magistrate, and the magistrate may, if it appears to the magistrate that it is necessary to detain him for the purpose of undergoing tests, *order him to be so detained for such period not exceeding fourteen days to undergo tests* ***or*** *the magistrate may release him on bail,* with or without surety, to attend at such time and place as may be mentioned in the bond for the purpose of undergoing such tests ... (emphasis added)

Appreciating the italicised words, at the stage when a detainee is brought before a magistrate on suspicion of being a suspected drug dependent, the magistrate under s. 4(1)(b) of the Act has two courses of action. They are:

a) if it appears necessary to him, order thc detainee to be remanded for a period not exceeding 14 days, during which time the latter will have to undergo medical tests; or

b) release the detainee on bail with or without surety with specific instructions written on the bond on the time and place to undergo the medical tests.

The poser that confronted me then was whether a magistrate could lawfully make a second order, to release a detainee on bail when he already had made an earlier order to detain the latter, also for the purpose of undergoing medical tests. This second order was made on the pretext that the judicially ordered tests were not complied with on the detainee. To reiterate, the consequential question that must follow in its wake was:

> Could the magistrate after having made the remand order make another order under the same provision, in that he could resort to both alternatives, though at different times?

Scrutinising s. 4(1)(b) of the Act, it is crystal clear that Parliament had resorted to the word "or" as opposed to the word "and", to distinguish the alternatives. That being so, it is by logical sequence that the legal definition of the word "or" be determined, in order to determine the confines of the magistrate's power to deal with this particular provision. In the case of *Green v. Premier Glynrhonwyy Slate Co* [1928] 1 KB 568, Scrutton LJ had occasion to state:

> You do sometimes read "or" as "and" in a statute ... . But you do not do it unless you are obliged because "or" does not generally mean "and" and "and" does not generally mean "or" ...

Maxwell on The Interpretation of Statutes, 12th edn by P. St. J. Langan in p. 232 had defined "or" as:

> In ordinary usage, "and" is conjunctive and "or" disjunctive.

In the *Statutory Interpretation* by Salleh Buang, the author had stated at p. 17:

> *The Brittanica World Language Dictionary* defines "or" as "the alternative expressed by or is emphasised by prefixing to the first number, or adding after the last. Put it another way, when there are several possibilities "or" is placed before the last. This means that when the word "or" is used there is a choice to be made, between one or the other and not to accept both of them ...

Having considered the above authorities regarding the word "or" in relation to s. 4(1)(b) of the Act, it is my view that it must be read as having a disjunctive effect rather than conjunctive. Any other interpretation will certainly be legally flawed, with chaos and uncertainty as the final by-product. In short, once the magistrate had signed Form 1 ordering the detainee to be detained for a given period for purposes of undergoing tests, he is barred from issuing any new order to release the detainee on bail based on the same purpose.

In this case, as the original order was limited to seven days, the magistrate could still extend it by another seven days until the fourteen days had been exhausted. In the event tests had been conducted but the results have yet to be obtained, the magistrate is empowered to make an order to have him released on bail, pending the outcome of the result. The last part of s. 4(1)(b) of the Act clearly permits it. It reads:

> ... or where such person has already undergone tests but the result of such tests has not been yet been obtained, the Magistrate may release him on bail, with or without surety, to appear at such place and time as may be mentioned in the bond to receive the result of the tests.

After a comprehensive deliberation of the matter, it is obvious that the release of the detainee on bail, after having made an earlier remand, purposefully for medical tests clearly contravened s. 4(1)(b) of the Act. Such a decision was a conspicuous blatant disregard of the said relevant statutory provision. Any non-adherence of the statutory provision, which has a profound effect on a person's freedom and liberty, would contravene the very principle safeguarded by art. 5 of the Federal Constitution. This article states:

> No person shall be deprived of his life or personal liberty save in accordance with law.

At the end of the day, based on the grounds submitted by the detainee, coupled with the two supplementary grounds, I had no hesitation in granting the writ of *habeas corpus*.